IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 181 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GANDHI & ASSOCIATES

Versus

MINAL OIL & AGRO IND.PVT. LTD.

Appearance:

M/S TRIVEDI & GUPTA for Petitioner

MR SUNIT S SHAH for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 21/11/2000

ORAL JUDGEMENT

The petitioner- M/s. Gandhi & Associates filed this petition under sec. 433 and 434 of the Companies Act, 1956 for passing an order of winding up against M/s. Shree Minal Oil & Agro Industries Pvt. Ltd. (hereinafter referred to as the 'respondent-company') on the ground

that the company has failed and neglected to pay the principal amount of the dues of the petitioner i.e. Rs. 10,90,443/.

It is the case of the petitioner that the respondent company is deemed to be unable to pay its debts and is commercially insolvent and has absolutely costs substratum. A statutory notice under sec. 434 dated 2.3.2000 was given by the petitioner to the respondent-company. In spite of acknowledging the same, the company has neither paid the amount nor has come out with bonafide dispute, and thus, has accepted the liability and, therefore, it is presumed that the company is deemed to be unable to pay its debts.

Learned counsel appearing for the petitioner after having taken me to the petition as well as reply filed by the respondent-company, submitted that by not disputing the amount of dues specifically in reply to the statutory notice, the so-called defence of defected goods having supplied raised in the affidavit in reply is no defence and in any case it is not a bonafide dispute. In support of his submission, reliance is placed on various rulings of various Courts.

Perusing the papers, it appears that the petitioner has undertaken to supply F.R.P. Storage Tanks to the respondent-company. The transactions between the parties are going on since 1997. It further appears that the petitioner has supplied F.R.P. Storage Tanks, the total value of the goods comes to Rs. 28,90,443/. It is also clear that the company has made entire payment for the goods received by it except Bill No. 25 dated 19.6.1998 and Bill No. 30 dated 13.7.1998. The total value of these bills comes to Rs. 9,69,997/, which according to the company, three defective F.R.P. Storage Tanks were supplied. The correspondence further reveal that the respondent-company has in fact, on 30.7.98 no sooner after receiving the goods, complained about the defective goods sent by the petitioner. A further remainder dated 6.10.1998 in the same line was also addressed to the petitioner. The learned counsel for the petitioner has submitted that the petitioner has not received letter dated 30.7.98 and remainder dated 6.10.98 and that they are fabricated documents. Whether those letters have been received by the petitioner or not and whether they are fabricated or not are the disputed questions of facts, which can only be decided in a suit. It is also clear from the correspondence between the parties that over and above the written communication, there were telephonic talks between the parties. In

substance, the parties were exchanging correspondence about the goods in question. Having failed to get the amount for the disputed two bills, the petitioner, for the first time, after about two years, gave statutory notice under sec. 434 of the Companies Act to the respondent-company and the respondent-company replied to the said notice on 24.3.2000. True, it is not specifically stated therein that the petitioner supplied defective goods. However, the respondent-company has clearly demanded to furnish detailed accounts and without detailed accounts, it is not possible for the respondent-company to reconcile its record with the record of the petitioner and, therefore, it is not possible for them to ascertain the exact outstanding balance. Not only that, it is specifically stated by the company that until reconciliation of accounts is complete, notice may be kept in abeyance. In one more letter dated 26.3.2000 addressed by the respondent-company to the petitioner wherein the respondent-company has clearly stated that they disagree with the outstanding balance shown by the petitioner. On the contrary, on scrutiny of the detailed accounts statement, the respondent-company found certain discrepancies with respect to the certain bills. On the contrary, the said reply further reveals the fact that as per the telephonic talks with the company at 5.15pm with Girishbhai Patel on 28.3.2000 regarding withdrawal of notice served by the Advocate of the petitioner and it was agreed by him and, therefore, it was requested not to act upon the notice.

The aforesaid facts would clearly go to suggest that the respondent-company immediately after the receipt of the goods brought to the notice of the petitioner that the goods sent by the petitioner vide bill no. 25 and 30 are defective goods and for that since 1998 the parties were negotiating. In any case, the said fact was within the knowledge of the petitioner and, therefore, merely because in reply to the statutory notice, if the respondent-company has not stated about the defective goods supplied to it, it cannot be contended that the respondent-company has come out with a said dispute for the first time only in the affidavit in reply. In affidavit-in-reply to the petition, in para-7 it is clearly stated that "without any hesitation, the deponent herein makes a statement that if the said three F.R.P. Tanks supplied under the aforesaid two invoices which are found defective and lying at our factory at Nandasan and if the petitioner is willing to take away the said three tanks then delivery thereof will be effected immediately because the said three tanks are unused and if the

petitioner replaces the said three F.R.P. tanks of sound quality as per the order, then the deponent on behalf of the respondent-company states that he has no objection for making the payment as per the invoices. In this view of the matter, I am clearly of the opinion that the dispute raised by the respondent-company is bonafide dispute. Alongwith the said affidavit in reply, the respondent has produced the statement of account supplied by the petitioner at page 41 and 42. Perusing the same, it is clear that the petitioner has in fact, supplied the goods worth Rs.11 lacs after the date of those two disputed bills and respondent- company has in fact paid the said amount of Rs. 11 lacs for the goods purchased by it. This fact will further confirm the fact that the dispute raised by the respondent company with respect to the disputed bill is bonafide dispute.

It is now well settled that no order of winding up can be passed against a company where the company has raised a bonafide dispute regarding the alleged dues and the disputed question of facts are involved in the petition. In the present petition also number of disputed questions of facts involved stated above which can only be decided in the suit where the parties can lead appropriate evidence. In any case petitioner cannot be encouraged for their claims of disputed bills, for which they waited for more than 2 years exchanging communications with respondent-company especially when company has cleared the subsequent bills of substantial amount of the petitioner. The short cut adopted by the petitioner namely instead of filing civil suit, by filing present petition is nothing but a pressurising tactics, can never be encouraged. The petition is liable to be rejected even on this count also.

Learned counsel for the petitioner invited my attention to the following decisions:

1. 1996 (Vol.85) Company Cases, p. 190, Calcutta High Court.

2. 1996 (Vol.86) Company cases, p. 703 (Punjab & Haryana High Court).

3. AIR 1996 Punjab & Haryana High Court, p. 60.

4. (1996) 1, Company L.J., p. 230, Delhi High Court.

5. 1985 (Vol. 57) Company Cases, p. 81, Karnataka High Court.

6. 1983 (Vol.54) Company Cases, p. 41. Calcutta High Court.

After having gone through the aforesaid decisions, I am clearly of the view that there cannot be a dispute with regard to the principle laid down therein. However, considering the facts of the case on hand, I am clearly of the opinion that none of the aforesaid decision will help the cause of the petitioner.

In view of this, I see no merits in this petition and is rejected without there being any as to costs.

(K. R. VYAS, J.)
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